

Wisconsin Society of Architects
January 1988

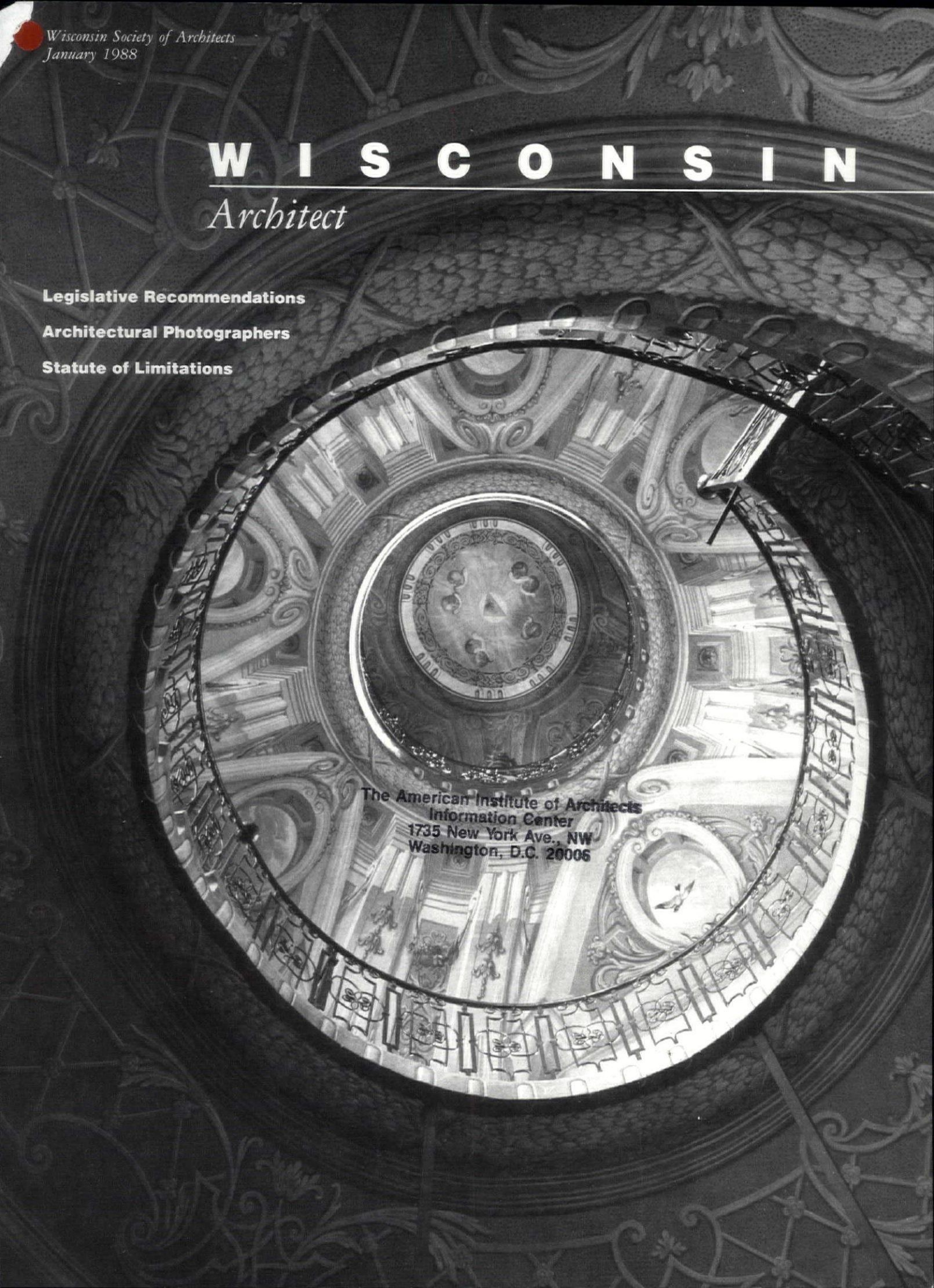
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Architect

Legislative Recommendations

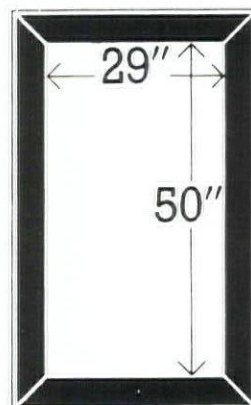
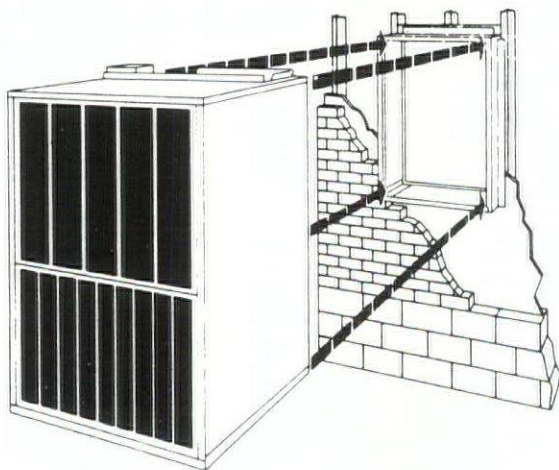
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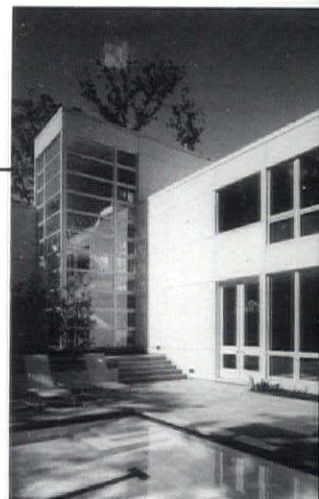
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Features

- 7 Guest Photographers
- 13 "Plan Stamping"
Matthias R. Goebel, AIA
- 15 1988 State Legislative Recommendations
- 20 When Can an Architect Relax —
Proposed Wisconsin Liability Limitation Law
Thomas M. Pyper

Departments

- 5 Guidelines
- 25 Forum
- 26 Society News
- 30 Marketplace



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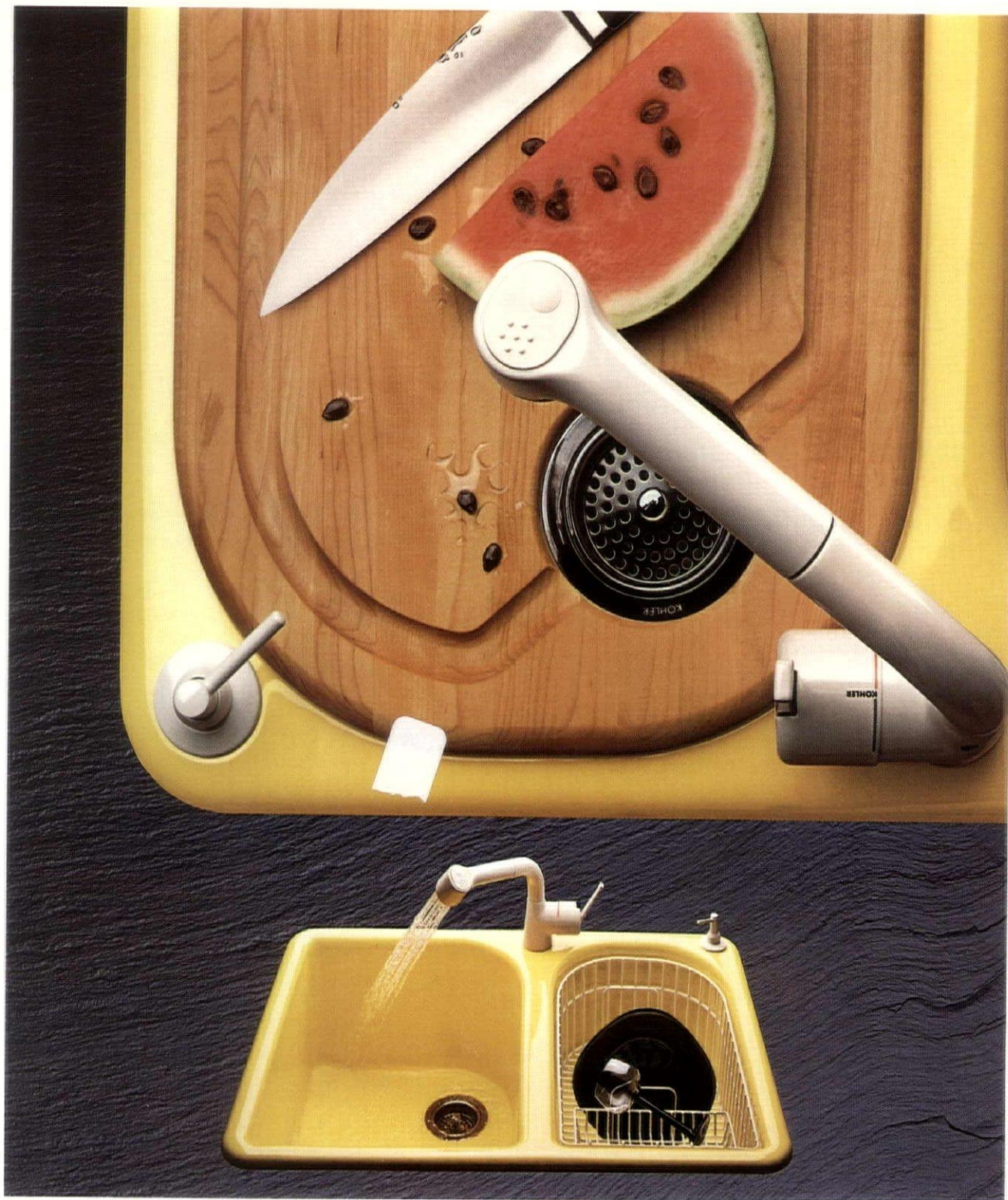
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As is tradition, this issue of the magazine is devoted primarily to legislative issues of concern and

... professional liability,
interest to Wisconsin's architectural profession. There is no shortage of legislative issues and proposals

civil justice reform,
that could have a direct impact on the practice of architecture and the construction industry in Wisconsin.

statute of limitations,
A discussion of the WSA's 1988 legislative recommendations is included as a special insert.

economic development
Legislative recommendations for 1988 address a number of issues including professional liability,

and sales taxes on
civil justice reform, statute of limitations, economic development and sales taxes on professional

professional services ...
services.

These recommendations were developed and reviewed by the WSA Legislative Committee. This Committee meets monthly in Madison to monitor and discuss proposed state legislation and administrative rules that would affect the profession. Members are encouraged to contact the WSA office if you are aware of any proposed or existing legislation that should be addressed by the Legislative Committee. This grassroots feedback is vital to the success of the WSA's legislative program.

*Bill Babcock
Executive Director*

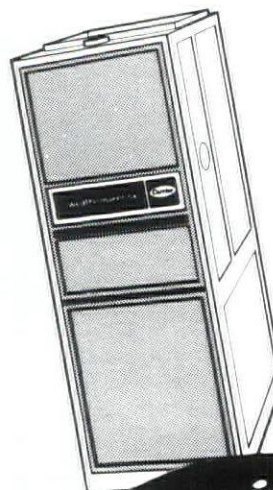
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Focus on Architecture

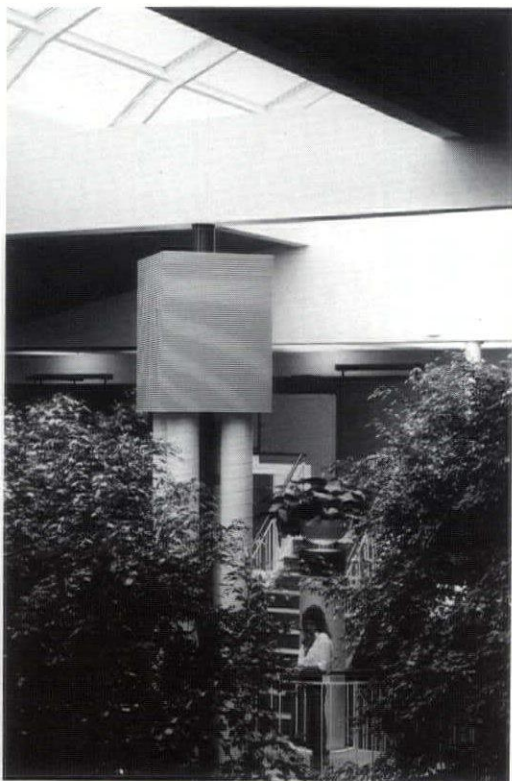
Only the eye of a good photographer can make a building look its best. Also, "its best" may not always be viewed from the street.

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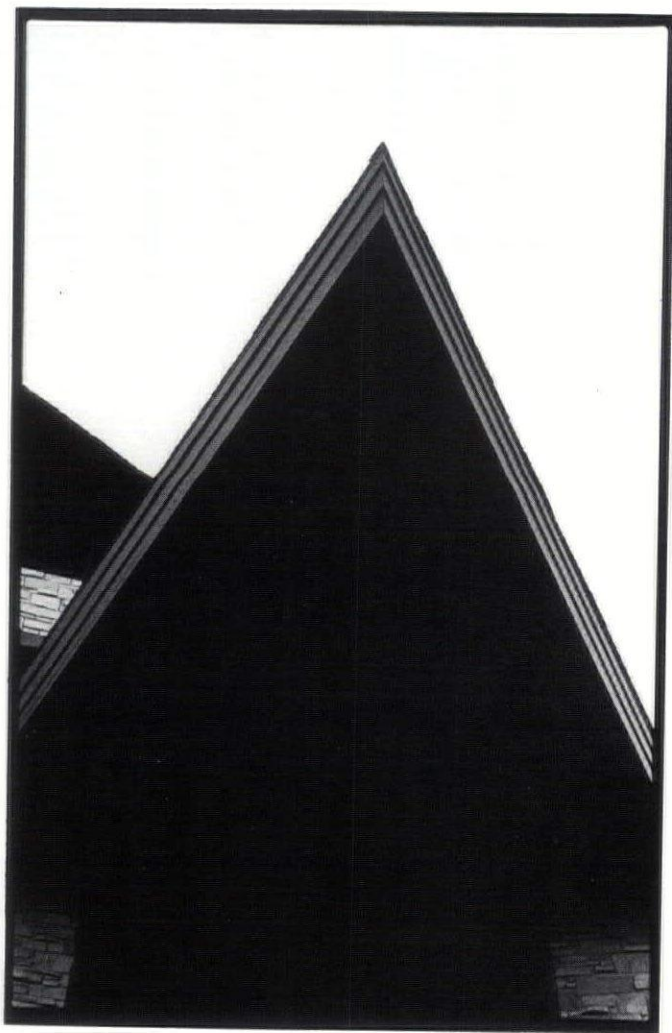
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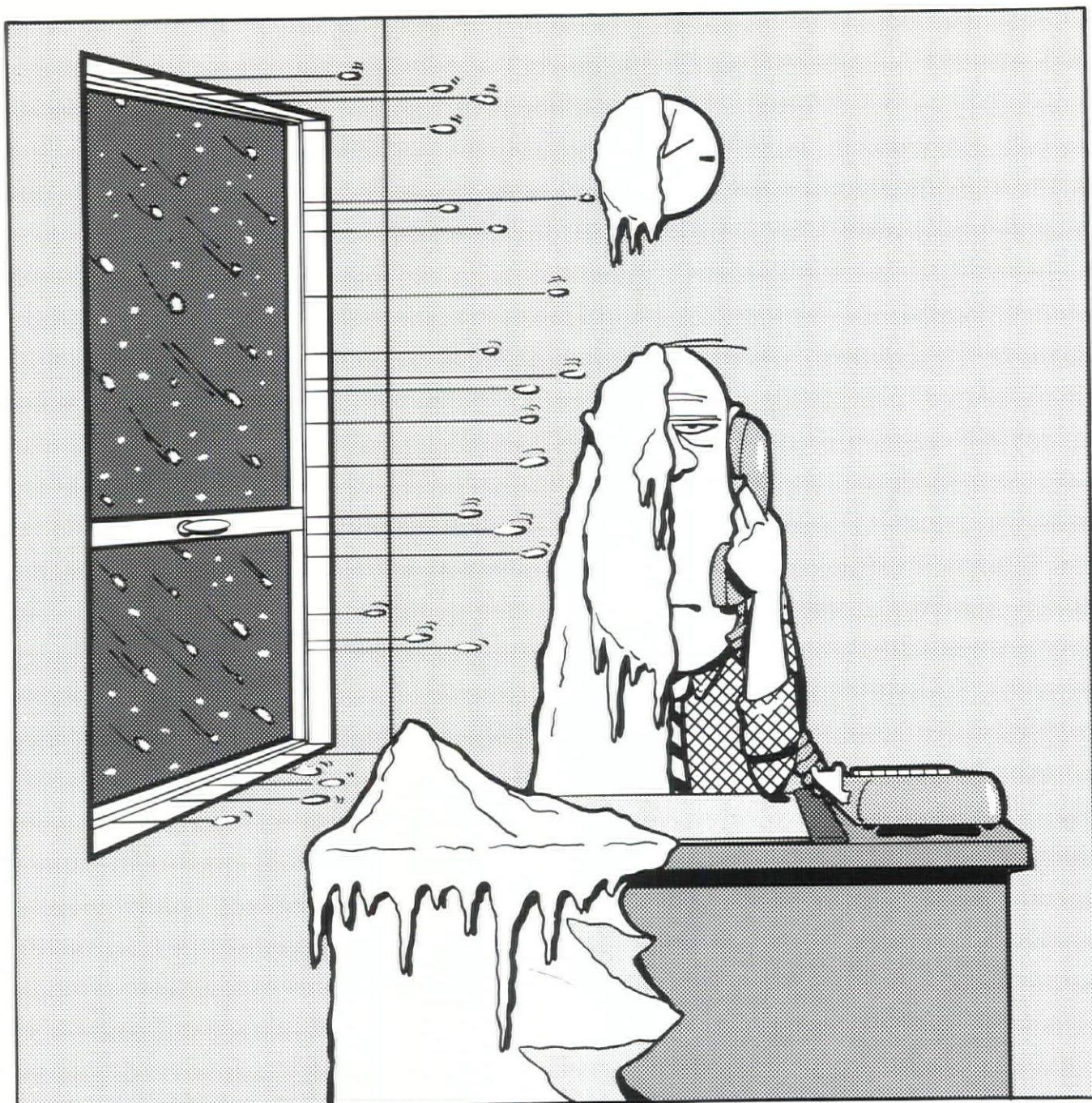
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"Plan Stamping"

Recently, the Architect Section of the Wisconsin Examining Board of Architects, Engineers, Designers and Land Surveyors reviewed a case of a Wisconsin architect who had been reported to the Board for "Plan Stamping".

In reading the complaint and listening to the testimony of the architect, it seemed to the Board that "Plan Stamping" was an issue that perhaps was not clearly understood by the design professionals in our state. As a consequence, this article was written in hopes that it may be helpful to our architects, engineers and designers.

The Wisconsin architect in this case signed and sealed drawings which were prepared in another state by unregistered persons.

The work was not done under his personal direction and control. During the hearing, the architect stated that he had checked the drawings carefully and after making some changes, he stamped them and took them to DILHR for approval. He alleged that the plan examiner, whose name he could not remember, told him it was all right to sign and seal the drawings on condition that he had checked them for conformance with the Wisconsin Building Code. The drawings subsequently were reviewed by DILHR, approved and construction proceeded to completion.

Was the plan examiner correct in stating that the architect was allowed to seal the drawings after checking them for code compliance? Unfortunately not. Section A-E 8.10 of the Wisconsin Administrative Code reads in part as follows:

"Plan Stamping (1) No architect, professional engineer or designer may sign, seal or stamp any plans, drawings, documents, specifications or reports for architectural, engineering or design practice which are not prepared by the registrant or under his or her personal direction and control." In the case at hand, the drawings were not prepared by the registrant nor were they prepared under his personal direction and control. It is regrettable that the architect was mis-informed by the plan examiner, if in fact he was. How-

ever, one can legitimately ask why the architect's question was directed to someone in the Department of Industry, Labor and Human Relations instead of more properly to the Department of Regulation and Licensing. Moreover, each individual licensee is required to know the rules governing the practice of his or her chosen profession. After hearing all the testimony the Board found the architect guilty of plan stamping and issued a public reprimand to the architect.

There are provisions in the Wisconsin Administrative Code, Rules of the Department of Industry, Labor and Human Relations, for Wisconsin architects, engineers and designers to review the work of out-of-state professionals, not registered in Wisconsin in order to obtain State approval of plans. (See ILHR 50.08) However, the Wisconsin architect may not affix his seal or stamp directly on the plans. Instead, the Wisconsin architect or engineer shall attach a certificate to the plans, dated, signed and sealed. The certificate shall indicate that the documents were prepared in a state other than Wisconsin by an architect or engineer registered in that state; describe the work performed by the Wisconsin professional and include statements that the documents have been reviewed and comply with all applicable building codes.

These requirements are entirely consistent with A-E 8.10. If architects, engineers or designers who are registered in Wisconsin have questions concerning plan stamping they can be directed to the board office at: Department of Regulation and Licensing

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In a somewhat related matter, it came to the attention of the Architect Section that a Wisconsin architect, who maintained an office in City "A", was providing services to a construction company in City "B". The construction company has drafters on staff

who prepare drawings for buildings requiring the seal of a licensed architect or engineer. The architect, in this instance, had an arrangement with the construction company to visit their office periodically and review the work of their drafters. Subsequently, the work of the drafters is sealed by the architect and presented to DILHR for plan approval. The Board was asked whether or not this practice is allowed.

The answer to the question is, "No, it is not allowed." There are three separate sections and perhaps more in the Wisconsin Administrative Code which address this matter. Section A-E 2.03 (2) (a) requires a resident architect in each separate business location which provides or offers to provide architectural services. Obviously, one person cannot serve as resident architect in two different locations at the same time.

Section A-E 2.03 (4) states, "A resident may not be in charge of or responsible for services offered or provided from more than one business location."

Section A-E 8.07 (2) prohibits architects, engineers, designers and land surveyors from aiding or abetting the unlicensed practice of architecture, professional engineering, designing or land surveying. It seems quite apparent that the drafters in the contractor's office in City "B" are practicing architecture without a license. The drafters are not employees of the architect and are not under his personal direction and control.

In conclusion, the Architect Section of the Wisconsin Board urges all registrants to review periodically the Wisconsin Statutes and Administrative Code Relating to Architects, Professional Engineers, Designers and Land Surveyors. The latest edition is dated April 1987 and can be obtained by forwarding a check for \$3.15 payable to the Department of Regulation and Licensing.

EDITOR: The author is Chairman of the Wisconsin Examining Board of Architects, Professional Engineers, Designers & Land Surveyors. He also served as a member of Governor Earl's Task Force on Professional and Occupational Discipline.

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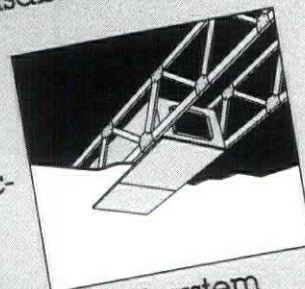


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Memorandum

Date:

January 1988

To:

Members of the Wisconsin Legislature

From:

H. James Gabriel, AIA, President

Re:

Wisconsin Society of Architects
1988 State Legislative Recommendations

In the rush of events during the legislative session, it often is difficult to effectively communicate with all interested legislators regarding the issues of concern to Wisconsin Architects.

The accompanying position paper provides a summary of the Wisconsin Society of Architects' major legislative recommendations and concerns. It is our attempt to help you better understand both the positive and negative impact of legislation on the architectural profession.

Our legislative agenda for 1988 includes the following recommendations:

- Support for the recommendations contained in Senate Bill 330 to restore balance and fairness to Wisconsin's civil justice system.
- Enactment of a clear and definitive statute of limitations for actions against architects and others involved in the design and construction of improvements to real property as contained in Senate Bill 363 and Assembly Bill 622.
- Support for state economic development policies and programs to improve and protect the health and vitality of Wisconsin's economy.
- Opposition to proposals to expand the state sales tax base to include architectural and other professional services.

This position paper outlines the major public policy issues which Wisconsin architects have addressed in the past and will continue to address in the future. Most of the recommendations are broad in scope and are of interest to many other Wisconsin organizations. For example, the civil justice reform, statute of limitations and sales tax recommendations reflect the general consensus of a large number of similarly affected groups.

On behalf of the members of the Wisconsin Society of Architects, I hope you will find the accompanying position paper both interesting and informative. Please do not hesitate to contact our office in Madison if you require further information on any of the issues discussed. We look forward to working with you on these and other issues of interest to Wisconsin's architectural profession as they arise throughout the current legislative session.

The following is a summary of the major 1988 legislative recommendations and concerns of the Wisconsin Society of Architects.

Professional Liability

Architects assume levels of professional liability far in excess of their level of compensation — probably to a greater degree than any other profession. The cost of insuring against that liability is increasing rapidly and has become an important factor in the overall cost of providing architectural services.

The excessive cost of liability insurance, if such coverage is available at all, is driving some Wisconsin architects out of the profession. Other architects faced with premiums averaging 8% or more of annual operating revenues are deciding to "go bare" and practice without insurance coverage. All architects are frustrated with the continued increase in cost of claims — an evolution that appears to permeate not only architecture and the construction industry, but society as a whole.

Architects believe certain statutory changes are appropriate and necessary to help hold down the high cost of professional liability insurance and, thus, overall public and private building costs.

Civil Justice Reform: SB 330

A critical examination and careful overhaul of Wisconsin's civil justice system is necessary. Statutory reforms clearly are required to establish a reasonable and predictable balance between the legitimate demands of individuals to be compensated for genuine negligent acts and the excessive liability claims associated with our current civil justice system.

To support efforts to restore balance in the state's tort system, the Wisconsin Society of Architects has joined forces with over 100 other groups to establish the Wisconsin Coalition for Civil Justice. Legislation, Senate Bill 330, has now been introduced which contains the following five recommendations developed by Coalition:

- **Joint and Several Liability**

Maintain the legal concept of comparative negligence, but replace joint and several liability and its inequitable reliance on the "deep pocket" defendant with an obligation to pay damages on the actual degree of fault. The joint and several liability provision in existing law can require a defendant found to be 1% negligent to pay 100% of the damages awarded.

- **Punitive Damages**

Eliminate punitive damages except in the case of intentional torts. Intentional torts include slander, unlawful imprisonment or areas where there was malicious and gross misconduct.

- **Double Recovery**

Prohibit double recovery in compensation for an injury. By altering Wisconsin's collateral source rule, the proposal would prohibit a defendant from collecting damages from more than one source.

- **Noneconomic Awards**

Impose a \$250,000 cap on awards for noneconomic damages such as pain and suffering.

- **Contingency Fees**

Give the court more scrutiny over attorney's fees. The court in which a civil court action is conducted would be required to review and approve the amount of every contingency fee paid as being reasonable to the circumstances.

The Coalition's five-point proposal reflects a rational and responsible approach to reforming Wisconsin's civil justice system and ultimately lowering liability insurance costs. It protects the rights of the injured to seek redress through unrestricted access to the courts, while at the same time deterring frivolous litigation and providing a degree of predictability and reasonableness to damage awards not present in the current system.

The current concept of "joint and several liability" is a good example of how existing law can impose a substantial and inequitable burden on individuals and firms with large assets or insurance coverage, i.e. deep pockets, regardless of their degree of fault in causing an injury. As has already been adopted in

a growing number of states, SB 330 would limit the liability of those who cause injury to others to their proportionate share of the responsibility for the injury.

When anything goes wrong with a building the architect is virtually assured of being named as a co-defendant in any action . . . even when there is no evidence of responsibility. Despite efforts by architects to improve professional practice and reduce liability exposure, the number of claims filed against insured architectural firms has increased from an average of 11 per 100 to 44 per 100 in the last ten years. However, fewer than 10% of the claims filed against architects result in a payment to the plaintiff by the insurance company. Nonetheless, due to the high cost of defending themselves against non-meritorious suits, even when architects win . . . they lose.

There is a clear need for the Legislature to address the issue of civil justice reform. The Wisconsin Society of Architects strongly supports adoption of the recommendations contained in SB 330.

Statute of Limitations: SB 363 and AB 622

Another important factor affecting the liability exposure of Wisconsin architects and others in the construction industry is the statute of limitations governing actions against those involved in the design and construction of improvements to real property. Legislative action is necessary to strengthen Wisconsin's current statute of limitations.

The Wisconsin Legislature has enacted two statute of limitations laws for the construction industry during the last several decades requiring that actions must be brought within six years of substantial completion of a building. However, subsequent Wisconsin Supreme Court decisions have weakened the legislative intent of these laws and allowed claims many, many years after the six-year limitation. For example, the court ruled that the current statute of limitations law does not apply to building projects completed prior to 1977.

For decades courts have recognized the prerogative of legislative bodies to establish time periods within which lawsuits can be commenced. The rationale for all statutes of limitation is the balancing of the interests of potential plaintiffs in bringing suits for their injuries with the interests of potential defendants in certainty and finality in the administration of their affairs . . . to be free from suit after a reasonable period of time.

The need to balance these competing interests is particularly compelling in the context of a construction project. The useful life of an improvement to real property can extend for centuries, leaving the architect and the architect's estate with virtually unlimited liability. The necessary extended record keeping involving all contract documents, shop drawings, change orders and other documentation establishing the liability among many players (owner, architect, engineer, general contractor, subcontractors, materials suppliers, etc.) is an excessive and perhaps impossible burden. Further, after the owner's acceptance of the project all maintenance and subsequent improvements are beyond the control of all the other parties to the initial construction.

Forty-two states have some form of statute of limitations for actions arising out of improvements to real property. These are the oldest and probably the most fundamental type of statutory remedy for architects' liability problems. The statutory limitation periods range from four to fifteen years, with an average of nine years.

The Wisconsin Society of Architects and others in the construction industry support the adoption of legislation, Senate Bill 363 and Assembly 622, which has been introduced in both houses of the Legislature to improve and strengthen Wisconsin's current statute of limitations law. The pro-

posed legislation would extend the statute of limitations period from six to ten years after substantial completion and clarify that construction projects completed prior to 1977 are covered by the new law.

Statewide Building Code

Wisconsin has a long tradition of a uniform state building code that is applied throughout the State of Wisconsin. Historically this code has been developed based upon legislative mandate with extensive public participation in the formulation of the specific administrative rules which make up the code.

The Wisconsin Society of Architects strongly supports the concept of a uniform state building code that provides a fair and equal standard for building design and construction within our state and provides for active participation and input by architects in its formulation

State and Local Procurement of Architectural Services

Civilizations are frequently measured by the quality of their public architecture. The Wisconsin Society of Architects believes that the quality of public buildings deserves no less attention today than in the past. There are few structures which have an impact on the health, safety and welfare of a greater number of citizens than those built by public bodies.

The Wisconsin Society of Architects supports current administrative rules pertaining to the selection of architects/engineers by the State of Wisconsin. This selection process is modeled after the federal "Brooks Act" which governs procurement of professional services by the federal government. It also is similar to the selection process recommended by the American Bar Association and used in at least 40 other states. The procurement process requires architects to compete on the basis of qualifications and competence and at the same time insures that the public does not pay more than a fair and equitable fee for the services rendered.

Economic Development

While many new economic development tools are already in place, the Wisconsin Society of Architects shares in the public consensus that state government must continue to investigate ways to make Wisconsin's business climate more attractive for job-creating investments.

The Wisconsin construction industry was one of the hardest hit sectors of the state's economy during the last recession. Between 1979 and 1985, total construction industry employment in Wisconsin dropped 20% — a loss of nearly 16,000 jobs. As a result, construction industry jobs which accounted for 5% of total private employment in 1979 now represent less than 4% of all private jobs in Wisconsin.

The Wisconsin Society of Architects encourages the Legislature to remain sensitive to economic development concerns and issues as it debates the state spending and tax proposals to be included in the state budget for fiscal 1988-89. We remain strongly opposed to any proposal that would broaden the state sales tax base to include architectural and other professional services. Such a sales tax expansion would not only have a direct negative impact on the state's architectural profession and construction industry, but also would hinder Wisconsin's future economic growth and vitality.



Architectural

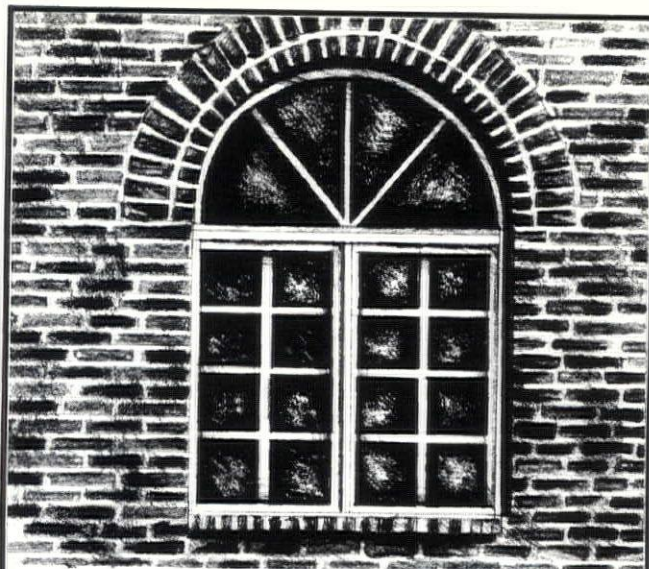
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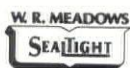
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When Can an Architect Relax — Proposed Wisconsin Liability Limitation Law

Bill put down his pencil. The design for the new convention center had gone smoothly, thanks to his new CAD system. But Bill was still worried. He knew there was a room in his drawings that only he could see. It was in all of his drawings. It was not really a cell, but Bill knew he could not escape from that room. He had to wait there until enough time had passed to bar claims against him for any mistakes he might have made. Only then could he finally leave the convention center. Only then would his liability waiting room be erased.

How long an architect remains vulnerable to a lawsuit is of growing concern. Claims against architects in the last ten years have risen from 11 per 100 to 44 per 100.¹ The current frequency suggests that there is about a 50-50 chance an architect will be sued on any project, regardless of the quality of his or her work.

This article first traces the history of statutes and court decisions in Wisconsin that have tried to set a definite liability period for architects and others involved with construction projects. That history shows that, because of constitutional problems with previous and existing law, the period of exposure remains uncertain. The article then analyzes proposed legislation that is intended to remove those constitutional defects. That analysis shows that, although the exposure will be extended from six to ten years, if the modifications suggested in this article are adopted, the new law will remove the constitutional uncertainties. Architects, such as Bill, will finally know when they can relax.

Wisconsin's First Unconstitutional Completion Statute

Before 1961, property damage caused by defective property in Wisconsin was governed by a six-year accrual statute of limitation.² The "accrual" period meant that a party had six years

after the date of the property damage to bring a lawsuit.³ Because damage often occurred years and even decades after the completion of construction, an architect or builder was subject to indefinite liability exposure. Yet, between completion of construction and the date of injury, the architect had no control over the building and had no access to evidence that might be important to defend a later lawsuit. Memories fade with time, witnesses leave and records disappear. Although it is difficult to strike the balance between the need to compensate injured persons against the need to provide a reasonable period of repose for architects, the early "accrual" statute tipped the scales decidedly against architects.

In August, 1961, Wisconsin enacted a new liability limitation statute.⁴ Rather than an accrual statute, the new law was a true statute of repose. It provided that no one could sue someone involved in construction for either personal or property damages caused by a defective improvement to property more than six years after the construction was finished. Because the limitation period began to run at the end of construction (rather than the date of injury), the new law was known as the "completion" statute.

Although the completion statute otherwise applied generally to property improvements, owners were excluded from its six-year liability cutoff protection. Owners were also prevented from bringing a contribution or indemnification action against those protected by the statute after the six-year period. This meant that, even though a builder was immune from suit six years after completion of the construction, the owner could still be sued; but the owner could not require the builder to contribute to damages the owner had to pay for the builder's mistakes.

In two early cases the Wisconsin Supreme Court left no doubt that, without changes by the legislature, the first completion statute would not survive a direct constitutional challenge.⁵ Still no change was made. Finally, left with no alternative, the Court declared the completion statute unconstitutional in *Kallas Millwork Corp. v. Square D Co.*⁶

In *Kallas*, a water line on defendant's property ruptured, causing substantial damage to plaintiff's land. The water line had been installed more than 16 years earlier. There was no doubt that plaintiff's damage occurred much more than six years after construction. Plaintiff sued both the owner and the water line contractor anyway. The question thus posed was whether plaintiff's claim against the installer of the water line, and a claim by the owner against the installer for contribution, could constitutionally be barred by the completion statute.

The Wisconsin Supreme Court's constitutional criticism of the completion statute was twofold. First, the *Kallas* Court condemned the statute because it gave "special and unusual immunities" to persons involved in construction but excluded owners and persons who furnished materials. The Court recognized the public policy reasons that justified a limitation period favoring persons engaged in the construction business. It could not condone, however, a restricted class that excluded owners and some others connected to the property. As a result, the Court ruled that the distinctions among different potential defendants violated the equal protection clauses of both the United States and Wisconsin Constitutions.

The *Kallas* Court was also worried about constitutional problems raised when a person injured after the six-year repose period had no remedy. The Wisconsin Constitution provides that "every person is entitled to a certain

remedy in the laws for all injuries . . .⁷ The *Kallas* Court criticized the legislature for first providing that a person's right to recover could "accrue" years after construction was completed, but then declaring that the completion statute barred a remedy. The Court found "arguable merit" that denial of a remedy for "a legislatively recognized right" would be unconstitutional for violating the Remedy for Wrong provision of the Wisconsin Constitution.

Before *Kallas* the Wisconsin Supreme Court had implicitly asked the legislature to change the completion statute. After *Kallas* the legislature had no choice. It did enact a new completion statute. Questions remain, however, whether the legislature listened intently enough to the *Kallas* Court's concerns or whether instead the present completion statute is also on a collision course with the constitution.

Wisconsin's Second Completion Statute — A Cure or a Bandaid?

Wisconsin's current completion statute became effective in June, 1976.⁸ Four changes were made:

- 1 Persons doing "land surveying" or furnishing "materials" were added to those protected by the statute.
- 2 The six-year limitation period began to run from "substantial completion" of the construction project rather than from furnishing services and construction.
- 3 The sentence that had made the statute inapplicable to owners or persons in control was omitted. However, the new statute did not expressly include owners or persons in control as part of the protected group.
- 4 A provision was added allowing an extension of six months if the injury occurred more than five but less than six years after completion.

The Wisconsin Supreme Court held that the new completion statute could apply prospectively only.⁹ As a result, there presently exists a gap: construction projects completed before June 13, 1976, are subject to an accrual statute of limitations; construction projects completed after that date are subject to the present completion statute of repose. This creates an anomalous situation: an architect who designed a building in 1965 can still be sued if an injury occurs in that building; but the same architect cannot be sued over the design of a building substantially completed fourteen years later in 1979 because of the six-year repose period.

The Wisconsin Supreme Court has already cast a jaundiced eye toward the present completion statute. While not directly addressing its constitutionality, the Court has declared that the present law does not resolve the concerns voiced in *Kallas*.¹⁰ The *Kallas* Court found that the first completion statute denied equal protection by excluding, among others, owners and persons providing materials. Although the new law includes persons supplying materials, it does not include owners. The statute also continues to preclude a right of contribution or indemnification. An owner who is sued more than six years after the substantial completion of construction still cannot recover contribution from a negligent builder or architect. The new law also does nothing to eliminate the problem of allowing an action to accrue without a remedy after the six-year repose period in violation of the Wisconsin Constitution's Remedy for Wrong provision.¹¹ The identical problems that caused the *Kallas* Court to declare the first statute unconstitutional remain.

As it did with the first completion statute, the Wisconsin Supreme Court has implicitly told the legislature that the present statute of repose will likely be struck down on the same constitutional grounds as its predecessor if it is

not changed. This time, however, bills have been introduced in both houses of the legislature to enact yet a third limitation statute. With certain modifications, the proposed law should weather the constitutional storm.

Proposed Law: An Accrual And Repose Hybrid

Substantial changes have been made in the new legislation to address the constitutional problems that led to the demise of the first completion statute and threaten present law.¹² The differences are summarized as follows:

- 1 The new law would extend the time for commencement of a lawsuit from six to ten years from the date of substantial completion.
- 2 An accrual component has been added to the ten-year repose period. Within the repose period, actions would be required to be commenced within three years after the person discovered or should have discovered the act or omission that caused injury.
- 3 The new law would expressly apply to suppliers of materials and owners.
- 4 Fraud or express warranties for longer periods than those set forth in the statute would not be governed by the new law.
- 5 The new law would apply to all lawsuits commenced on or after the effective date, not just to those where the project was substantially completed after the effective date. However, for lawsuits commenced on or after the effective date involving an improvement that was substantially completed prior to the new law, the three-year discovery period would be extended for five months after the effective date of the law.¹³

The new law would fill the gap created when the first completion statute was declared unconstitutional and the present law held to apply prospectively only. As noted earlier, this created the problem of pre-1976 improvements being subject to an accrual limitation whereas post-1976 improvements are subject to the present statute of repose. All lawsuits brought after the effective date of the new law would be subject to its terms, irrespective of when the construction in question had been substantially completed.

The proposed law is a hybrid between accrual and repose periods. The proposed law extends from six to ten years the time in which a lawsuit must be started after substantial completion of construction.¹⁴ During that ten-year period, however, a person must commence the action within three years from the date the defect that caused the injury was or should have been discovered. Although incorporating the accrual, discovery component, the statute remains one of repose because of the ten-year absolute cutoff point. In other words, the statute still precludes a person who is injured more than ten years after substantial completion of the project from bringing an action, even if that person could not have discovered the defect during the ten-year period.¹⁵

The hybrid law does address the constitutional problems that have bothered the Court. The *Kallas* Court struck down the first completion statute on equal protection grounds because persons providing materials and owners were excluded. Present law still excludes owners. This time the drafters listened to the Court and included owners and material persons in the proposed law. Although adding owners and material suppliers removes the equal protection problem noted by the *Kallas* Court, another classification problem, not yet presented to the Court, exists.

The proposed law, like its predecessor, distinguishes between different classes of persons who have suffered injury. A person touring a building built in 1970, who is injured by a product manufactured more than ten years before, can still recover from the negligent product manufacturer because of the accrual statute of limitations. However, a person injured on the same day in the same building due to a defect in the building could no longer bring a lawsuit because of the statute of repose. Even though the law creates these different classes among potential plaintiffs, it can do so and still not unconstitutionally deny equal protection if there is a reasonable basis for drawing the distinction.¹⁶ Because the Wisconsin Supreme Court has already acknowledged that a reasonable basis may exist in the fact that architects and contractors lose control over the building, the distinction appears to withstand an equal protection challenge when applied to architects and others involved in the actual construction.

Whether the proposed law could survive a constitutional challenge when applied to owners is less likely. Unlike architects or contractors, owners retain control of the property where construction has taken place. Nonetheless, under the proposed law an owner would be insulated against a lawsuit brought more than ten years after substantial completion of construction even if the owner had known all along of defects in the building, had been in a position to fix those defects, and yet had simply elected to ignore them. While there are sound public policy reasons for cutting off the time to sue an architect or contractor, those public policy reasons do not apply in all cases to owners.

The proposed law should make provisions for the difference between owners and those involved in construction projects. Where an owner's liability can be traced only to a defect in design or construction, so that the owner is only derivatively responsible, the owner should be entitled to the same

repose cutoff date provided to those involved with the construction. Where an owner in control of the property is directly negligent, however, for failing to maintain or inspect the premises and to cure defects that were known or should have been known, a person injured by that direct negligence should retain the right to bring a lawsuit after the repose period. The proposed law could accomplish this distinction by addition of the following exception clause:

"Nothing in this section shall apply to actions for damages resulting from negligence in the maintenance, operation or inspection of the real property improvement against the owner or other person in possession."¹⁷

Addition of the "owner negligence exception" would put persons injured by property defects on an equal footing with those injured by the acts of other negligent parties. Although it would lengthen the time for bringing a lawsuit against an owner, it would do so only if the injured person could prove the owner was directly negligent, not as result of someone else's negligence. Without the exception, however, the statute may fall against an equal protection challenge mounted by a plaintiff who was injured by an owner's direct negligence.

The remaining constitutional inquiry is whether the proposed law can coexist with Wisconsin's Remedy for Wrong constitutional provision. All statutes that set an absolute cutoff date for bringing a lawsuit, even if a person is injured after that date, do not automatically violate the Remedy for Wrong provision. Indeed, in the medical malpractice area, a Wisconsin repose limitation law has already withstood a Remedy for Wrong challenge.¹⁸ The problem with the previous and existing completion statutes is that the legislature expressly declared that a right to recover could accrue after the expiration of the repose period while, at the same time, it precluded any remedy. In other words,

the legislature created the right but took away the remedy for its violation. If instead the proposed law expressly declared that no right to recover could accrue after the ten-year repose period, the Remedy for Wrong provision would remain inviolate.¹⁹

The proposed legislation is an attempt to have the legislature set the period during which rights are available. The language of the proposed legislation should be strengthened, however, to clarify that the legislature is not barring a lawsuit after a right to recover has accrued. An affirmative statement should be added declaring that no right to recover can accrue after the ten-year repose period. Such direct language would assure the Wisconsin Supreme Court that there is no longer "a legislatively recognized right of action" that would be deprived of a remedy when injury is sustained, even if that injury is sustained after the ten-year repose period. With that clarification, and the "owner negligence exception" suggested above, the present legislation should survive constitutional challenge and at last provide certainty about liability cutoff to persons in the construction industry.

The proposed legislation, with the modifications suggested in this article, should eliminate the constitutional problems that have plagued previous and existing Wisconsin completion limitation laws. Architects and others involved with construction would then know that they had a ten-year maximum period of liability exposure after substantial completion of the construction project. On the other hand, injured persons would still be able to recover after the repose period for an owner's direct negligence and for ten years against those involved with construction. If the person were injured during the ten-year period, he or she would have to bring an action within three years of discovery of the defect just as persons injured through other means are subject to a discovery rule. The proposed law more fairly balances the interests of injured persons against the rights of architects and

others involved in construction to be free from defending stale claims. Most importantly, the proposed law, with the modifications suggested in this article, should accomplish that balance in a constitutional manner.

Editor: The author is a partner in the Madison law firm of Stafford, Rosenbaum, Rieser & Hansen. A substantial part of his law practice emphasizes construction-related matters. The suggested amendments to AB 622 and SB 363 have been drafted and introduced at the request of the WSA and the other construction industry organizations sponsoring this legislation.

- 1 Franklin, *The Architect's Viewpoint*, Consulting Engineer, p. 39 (Aug., 1986).
- 2 See Wis. Stat. § 330.19(5) (1959).
- 3 See, e.g., *School District v. Kunz*, 249 Wis. 272, 24 N.W.2d 598 (1946).
- 4 The statute was enacted by 1961 Laws of Wisconsin, chapter 412, effective August 23, 1961. It was first numbered Wis. Stat. § 330.155, but became Wis. Stat. § 893.155 when Wisconsin Statutes were later renumbered.
- 5 See, e.g., *Rosenthal v. Kurtz*, 62 Wis. 2d 1, 213 N.W.2d 741 (1974); *Cohen v. Toume Realty*, 54 Wis. 2d 1, 194 N.W.2d 298 (1971). These cases were decided on grounds that did not require constitutional scrutiny.
- 6 66 Wis. 2d 382, 225 N.W.2d 454 (1975).
- 7 Art. I, sec. 9, of the Wisconsin Constitution.
- 8 The second completion statute became effective June 13, 1976 by enactment in 1975 Wis. Laws ch. 335. It originally retained the same statutory number as the first, Wis. Stat. § 893.155. The number was later changed to the present Wis. Stat. § 893.89 (1986).
- 9 *United States Fire Ins. Co. v. E.D. Wesley Co.*, 105 Wis. 2d 305, 313 N.W.2d 833 (1982).
- 10 *United States Fire Ins. Co. v. E.D. Wesley Co.*, 105 Wis. 2d at 315.
- 11 The Wisconsin Supreme Court has expressly spotted this continuing problem. See *United States Fire Ins. Co. v. E.D. Wesley Co.*, 105 Wis. 2d at 317-18.
- 12 See 1987 Assembly Bill 622; 1987 Senate Bill 363. The Senate Bill has been referred to the Senate Commission on Judiciary and Consumer Affairs.

13 Under proposed legislation, express legislative "findings and intent" will be part of the actual statutory language. The apparent reason for this change is that the Kallas Court, when it struck down the first completion statute, acknowledged that there may be reasons for treating persons involved in the construction of improvements to property differently than persons involved in other industries. See *Kallas Millwork Corp. v. Square D Co.*, 66 Wis. 2d at 391. The new statute would make clear those reasons.

- 14 The ten-year period finds support in a study that indicated that 99.6% of all claims are brought within ten years after completion of construction. Jursik, *Defective Design-Wisconsin's Limitation Of Action Statute For Architects, Contractors And Others Involved In Design And Improvements To Real Property*, *supra*, at 109, reporting hearings on H.R. 6527, H.R. 6678 and H.R. 11544 Before Subcomm. No. 1 of the House Comm. on the District of Columbia, 90th Cong., 1st Sess. 28 (1977).
- 15 Similar laws in other states have survived constitutional challenges. See, e.g., Ill. Rev. Stat., Code Civ. Proc. § 13-214 (1982), constitutionality upheld in *Matayka v. Melia*, 119 Ill. App. 3d, 221, 456 N.E.2d 353 (1983); Minn. Stat. § 541.051 (1978), constitutionality upheld in *Calder v. City of Crystal*, *supra*; Mass. Gen. Laws Ann. ch. 260 § 2B (West 1973); Cal. Civ. Proc. Code §§ 337.1 and 337.15 (West Supp. 1978); Or. Rev. Stat. § 12.115(1) (1971), constitutionality upheld in *Josephs v. Burns*, 491 P.2d 203 (Or 1971); Mont. Code Ann. § 93-2619 (1947), constitutionality upheld in *Reeves v. Ille Electric Co.*, 551 P.2d 647 (Mont. 1976).
- 16 Equal protection inquiry focuses not merely on whether some inequality results from a classification, but rather on whether there exists any rational and reasonable justification for the classification. *Kallas Millwork Corp. v. Square D Co.*, 66 Wis. 2d at 388.
- 17 Minnesota's accrual/repose hybrid law contains this exception. See Minn. Stat. § 541.05(1) (1978).
- 18 See *Rod v. Farrell*, 96 Wis. 2d 349, 291 N.W.2d 568 (1980) (barring a patient's lawsuit for malpractice that could not have been discovered until 20 years after the operation did not violate Remedy for Wrong provision). The Wisconsin legislature has since enacted an accrual limitation statute based upon when an injured patient discovered or should have discovered the malpractice. See Wis. Stat. § 893.55 (1986).
- 19 Without a right, there can be no wrong that would require a remedy. See, e.g., *In Interest of E.C.*, 130 Wis. 2d 376, 389, 387 N.W.2d 72 (1986). Hybrid accrual/repose limitation statutes in other states that have prevented accrual after the similar repose period have survived constitutional challenges under Remedy for Wrong constitutional provisions. See, e.g., *Reeves v. Ill. Electric Co.*, *supra* (Montana); *Joseph v. Burns*, *supra* (Oregon).



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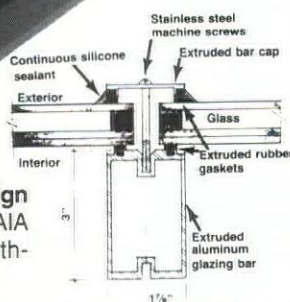
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When Is Construction Substantially Completed

Under both present law and proposed legislation, the liability period of repose begins to run from the date of "substantial completion of construction." Neither present nor proposed law defines the phrase. Recently, however, a Wisconsin court of appeals decided when the stopwatch begins to run.

In *Holy Family Catholic Congregation v. Stubenrauch Assoc., Inc.* 136 Wis. 2d 515, 402 N.W.2d 382 (Ct. App. 1987), Holy Family sued the architect and general contractor because of a leaky church roof. The contract between Holy Family and the architect provided that the architect could determine the date of substantial completion, which would signal when the owner could "occupy the Work or designated portion thereof for the use for which it [was] intended." Holy Family moved in and held its first worship service a month after the architect certified the date of substantial completion. The roof subsequently leaked, and subcontractors made unsuccessful attempts to fix it. Suit was not filed until six years after both the architect certified completion and Holy Family had moved in, but less than six years after the roof was fixed.

Holy Family argued that the date of substantial completion should be defined as the last date service was performed by those protected by the statute. Holy Family also argued that the six year repose period never began to run because a church with a leaky roof could not be considered substantially completed.

The court rejected both Holy Family arguments. It first found that "[t]he notion that the statutory period does not begin to run until all the project's participants have remedied every minor flaw would neutralize the word 'substantial' as it modifies 'completion.'" The court then rejected Holy Family's argument that the leaky roof prevented substantial completion. The court refused to consider the quality of construction when setting the date of substantial completion.

The court also rejected the architect's argument that the actual date the architect set for substantial completion should control, ruling that one party to a contract cannot unilaterally set the date of substantial completion. However, recognizing that the architect's and builder's control over a building declines when the owner takes possession, the court ultimately did agree with the architect's definition for substantial completion. It found that "the date of occupation and use for its intended purpose is a significant factor in signaling a building's substantial completion." Ruling that the date of substantial completion began when Holy Family occupied the building for its intended purpose and held its first church service, which was more than six years before the lawsuit was started, the court dismissed the action.

The *Holy Family* case suggests how architects and contractors can protect themselves by creating a construction record that will begin the liability time period as early as possible. Even though an architect cannot unilaterally set the beginning date, the *Holy Family* court ruled that "an architect's certificate of substantial completion may

be persuasive in determining the statutory date of substantial completion . . ." Accordingly, an architect should negotiate the right to mark the date of substantial completion. In the certificate setting that date, the architect should provide all reasons why the building is ready for occupancy, directly linking those reasons to the purpose for which the building is intended. The certificate issued by the architect should also invite the owner to provide contrary information, in writing, should the owner disagree that construction is substantially completed. If the owner remains silent and, perhaps six years (under present legislation) or ten years (under proposed legislation) later commences an action, the architect will have created a persuasive record to convince the court that the date of substantial completion was the date set by the architect, even if occupancy was delayed by the owner.

Editor: Thomas M. Pyper is a partner in the Madison law firm of Stafford, Rosenbaum, Rieser & Hansen. For additional background on Wisconsin's present and proposed statute of limitations for the design and construction of improvements to real property, turn to Mr. Pyper's article, "When Can an Architect Relax . . ." elsewhere in this issue.

WSA Minutemen

The Wisconsin Legislature is back in session and the WSA is attempting to update its list of architects participating in the Legislative Minuteman Program. This program was first organized over 11 years ago and involves utilizing individual architects as direct, grassroots contacts with state legislators.

The Minuteman Program has been most effective in furthering the WSA's legislative program. The current session of the Wisconsin Legislature will include numerous issues of high priority to the profession. Statute of limitations, professional liability, civil justice reform and sales tax on professional services are examples of the issues the Wisconsin Legislature will be debating which have a direct effect on your practice.

It's easy to participate in the Legislative Minuteman Program. Just call the WSA office and request a "Minuteman Registration Form." You'll receive a registration form and a directory of Wisconsin legislators. If you don't know the name of your state Senator or Representative, please call the WSA office.

The WSA Legislative Committee will provide you with full background information on legislative issues of high priority, and will advise you of the appropriate time to contact legislators on the different issues. The involvement of time necessary is quite minimal, especially when compared to the very substantial benefits that accrue to the profession by your participation. Call the WSA office and register today!

1988 WSA Design Awards

The WSA Design Awards Committee invites your participation in the 1988 WSA Honor Awards program. The deadline for the registration fee and entry letter is February 5, 1988. Completed submissions must be received at the WSA office in Madison no later than March 4, 1988.

For more information about the 1988 WSA Design Awards Program . . . eligibility, submission guidelines, dates, registration fee, entry forms, etc. . . . contact the WSA office. This year's Honor Award winners will be announced in May at the 1988 WSA Convention. Co-chairpersons for the 1988 WSA Honor Awards program are Emma Macari, AIA, and Ray Matulionis, AIA.

WSA President Testifies

A careful overhaul of Wisconsin's civil justice system is required to restore balance to the system and to help hold down ever-increasing liability insurance costs, 1987 WSA President Robert D. Cooper, AIA, told members of the Senate Judiciary and Consumer Affairs Committee at a December public hearing on Senate Bill 330.

"Our current civil justice system with its concept of joint and several liability encourages bringing lawsuits against all of the participants involved in a building project in search of the defendant with the 'deepest pockets'," Cooper told the committee. "If anything goes wrong with a building the architect is virtually assured of being named as a co-defendant in any action . . . even when there is no evidence of responsibility," Cooper said.

Cooper testified in support of SB 330 which would replace joint and several liability with an obligation to pay damages based on actual degree of fault, limit punitive damages, prohibit double recovery for an injury, impose a cap on noneconomic awards, and require court scrutiny over attorneys' fees. Particular exception was taken to the joint and several liability provision in existing law which can require a defendant found to be only 5% negligent to pay 100% of the damages awarded.

64 Years Ago

Does the accompanying photograph look familiar?

Emeritus member T.J. Bischoff, AIA, of Lowell, Wisconsin provided *Wisconsin Architect* with this photograph of an architect's office of 64 years ago. It is the office of Buemming & Guth Architects, 524 Jackson Street, Milwaukee, Wisconsin.

From left to right, the employees shown in the 1923 photograph are Ted Bischoff, Elliot Mason, Anthony Wuchterl, Alexander Guth and John Breckline.

Membership Action

Onyilofor, Michael, was approved for Student Membership in the Southeast Wisconsin Chapter.

Krohn, Steven, was approved for Associate Membership in the Northeast Wisconsin Chapter.

Heater, J.T. was approved for AIA Membership in the Southeast Wisconsin Chapter.

Petroviak, Martin, was approved for AIA Membership in the Southeast Wisconsin Chapter.

Smith, Scott M., was approved for AIA Membership in the Southeast Wisconsin Chapter.

Suchomel, Joan, was approved for AIA Membership in the Southeast Wisconsin Chapter.

Bartol, Christine, was approved for Associate Membership in the Northeast Wisconsin Chapter.

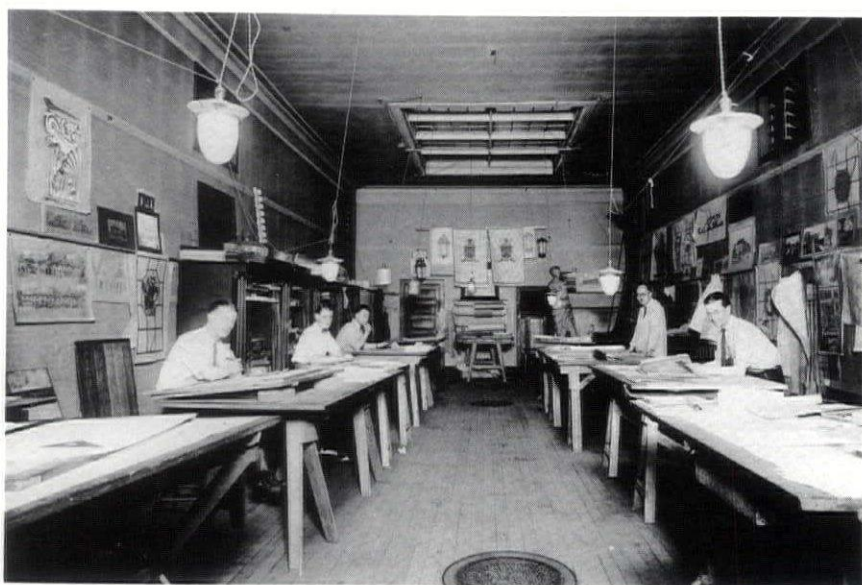
Devenish, Sharon, was approved for Professional Affiliated Membership in the Southwest Wisconsin Chapter.

WSA Convention

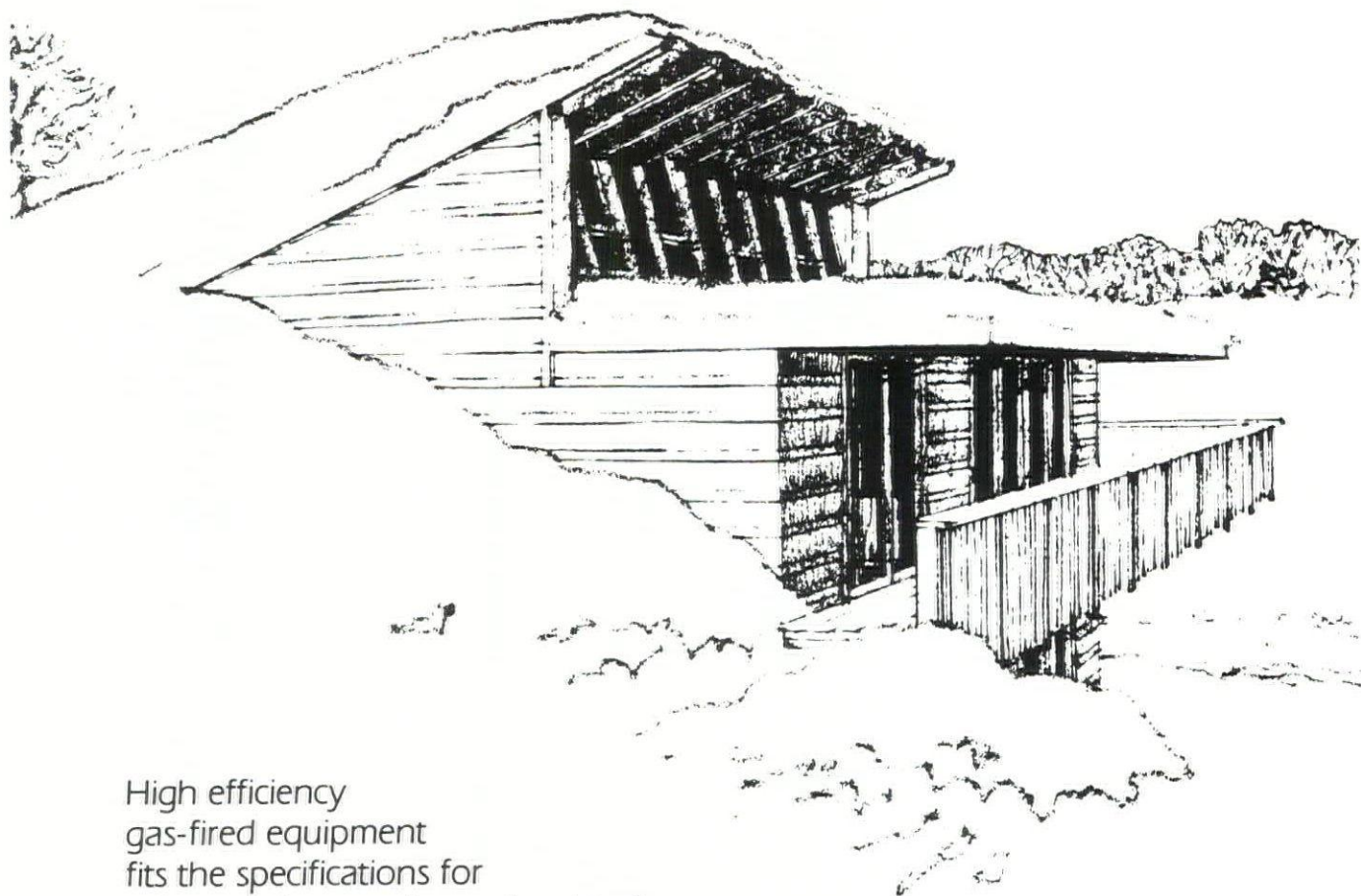
The 1988 WSA Convention Committee has been practically working night and day to put together a program of famous speakers, informative workshops, and exceptional product and service exhibits . . . not to mention several special surprises. The WSA Convention will be held May 10-11, 1988 at the Olympia Village in Oconomowoc, Wisconsin.

Convention Committee members who "volunteered" for this important assignment include Joe Powelka, AIA, Chairman; Bob Grapentin, AIA; James Jensen, AIA; Lisa Kennedy-Kimla, AIA; Jack Klund, AIA; and Dick Magliocco. Lynn Bichler is developing the graphics for the Convention.

You may want to call them up or drop them a note to thank them for their untiring efforts for the cause. Better yet . . . plan to come to the Convention and thank them in person.



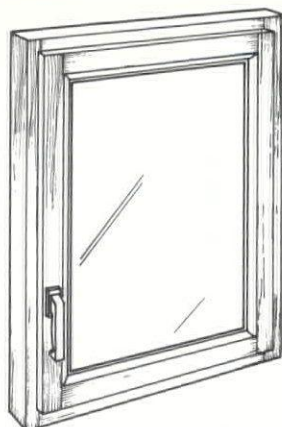
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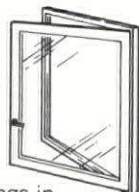




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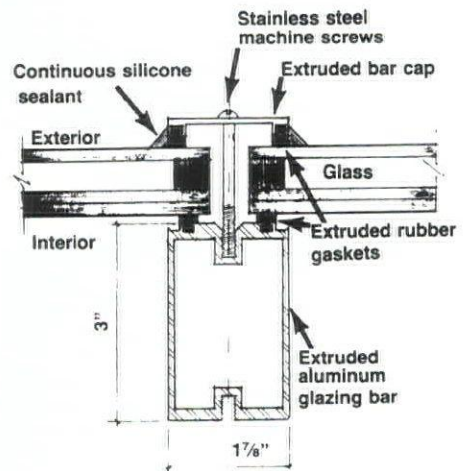


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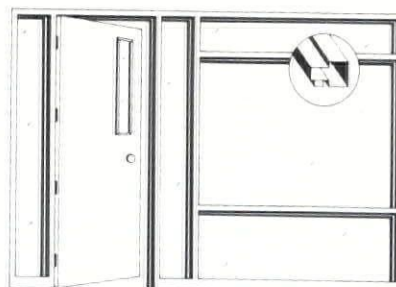
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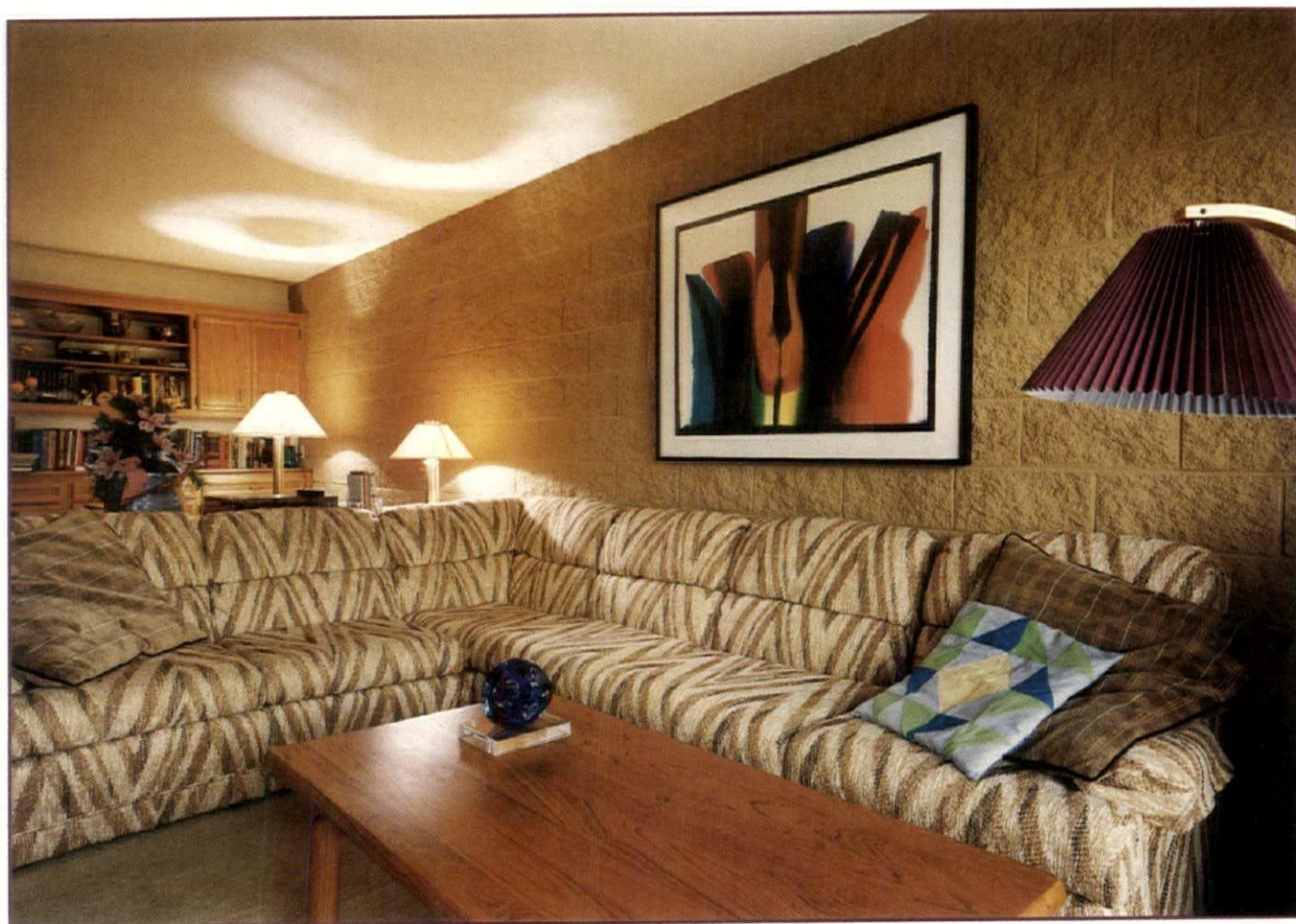
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